SUPREME COURT OF THE UNITED STATES.

No. 312.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

HARVEY FISK AND ALFREDERICK S. HATCH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

GOVERNMENT PRINTING OFFICE

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the United States of America, plaintiffs, and Harvey Fisk and Alfredrick S. Hatch, defendants, a manifest error hath happened, to the great damage of the said the United States of America, as is said, and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America,
for the uthern District of New York, in the Second Circuit.

The above writ allowed Oct. 18, 1865, New York ———.
SAM'L R. BETTS.

2 U. S. circuit court.

THE UNITED STATES, pl'ff in error,
vs.
HARVEY FISK and ALFREDERICK S. HATCH, def't in error.

By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, do hereby certify and return the judgment and proceedings in the case in the writ within mentioned, and that the following pages, numbered from 1 to 9 inclusive, contain a true and complete transcript of the record and proceedings had in the said court in the above case, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district

of New York, in the second circuit, this 27th day of November, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the said United States the ninetieth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

Filed Oct. 18, 1865.

3 U. S. circuit court, for the southern district of New York.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of April, to wit, of the 2d day of October, in the year of our Lord one thousand eight hundred and sixty-five.

Witness the honorable Samuel Nelson, one of the judges of the said circuit court.

[SEAL.] KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that heretofore, to wit, on the 26th day of September, 1865, in this same term of April, 1865, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came the United States of America, by D. S. Dickinson, their attorney, and brought into the said court, before the aforesaid judge thereof, then there, their certain declaration against Harvey Fisk and Alfrederick S. Hatch, being in custody, &c., of a plea of trespass on the case upon promises, which said declaration follows in these words, that is to say:

4 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The United States of America, plaintiffs in this suit, by D. S. Dickinson, their district attorney for the said southern district, complain of Harvey Fisk and Alfredrick S. Hatch, defendants in this suit, being in custody, &c., of a plea of trespass on the case upon promises. For that whereas, heretofore, to wit, on or about the first day of May, 1865, at the city of New York, in the said southern district, the said defendants then and there being, and during the month of April then last past having been co-partners, doing business as bankers under the firm name and style of Fisk and Hatch, and then and there and during the month of April then last past, having been licensed to do such business under the provisions of the internal revenue laws of the United States, became and were indebted to these plaintiffs in the sum of two thousand dollars, under and by virtue of the provisions of section 99 of the act of Congress approved June 30, 1864, entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," as the same was amended by the act of Congress, approved March 3, 1865, for the duties or taxes imposed by said section upon sales and contracts for sales of foreign exchange, promis-

sory notes, gold and silver bullion and coin, and government
5 and other stocks, bonds, and securities made by them, the said defendants, during the month of April, 1865, at the city aforesaid, they, the said defendants, then and there being the owners of such foreign exchange, promissory notes, gold and silver bullion and coin, and government and other stocks, bonds and securities, and making such sales on their own account and for themselves, and not for others or for a commission, and being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of two thousand dollars, when they, the said defendants, should be thereunto afterwards requested. Nevertheless, the said defendants, although often afterwards requested so to do, have not as yet paid the said sum of money above mentioned, or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendants have hitherto altogether refused and still do refuse, to the damage of the said plaintiffs of two thousand dollars, and therefore the said plaintiffs bring suit, &c.

6 And now at this day, that is to say, on the first Monday of October, in this same term of April, 1865, until which day the said defendants had leave to imparl to the said declaration, and then to answer the same, &c., before the said judges of the said circuit court, at the court buildings aforesaid, come as well the said plaintiffs by their attorney aforesaid, as the said defendants by William F. Allen, their attorney; and the said defendants, by their attorney aforesaid, defend the wrong and injury, when, &c., and say that they did not undertake or promise in manner and form as the said plaintiffs have thereof complained against them, and of this they put themselves upon the country, and the said plaintiffs do the like; therefore the issue above joined is ordered, by the said circuit court, to be tried on the 10th day of October in this same term, held at the United States court buildings, in the city of New York, at which day and place last above mentioned, before the honorable Samuel Nelson, one of the judges of the said circuit court, according to the form of the statute in such case made and provided, come as well the above named plaintiffs as the above named defendants, by their respective attorneys above mentioned, and the jurors of the jury, summoned to try the said issue, being called also come;
7 who to speak the truth of the matters aforesaid, being chosen, tried and sworn, say, upon their oath, that the said defendants did not undertake or promise in manner and form as the said plaintiffs have above complained against them.

Therefore it is considered that the said plaintiffs take nothing by their said declaration, but that they be in mercy, &c., and that the said defendants do go thereof without day, &c.

Judgment signed this 12 day of October, 1865.

R. E. STILWELL, *Deputy Clerk.*

Indorsed: U. S. circuit court, Harvey Fisk and Alfredrick S. Hatch, *ads*. The United States. Judgment record. William F. Allen, deft's att'y.

Filed Oct. 12, 1865.

8 U. S. circuit court.

THE UNITED STATES OF AMERICA
vs.
HARVEY FISK and ALFREDRICK S. HATCH.

Which said issue, in form aforesaid, joined between the parties aforesaid, afterward, to wit, at a circuit court of the United States of America, held at the United States court buildings in the city of New York, in and for the southern district of New York, in the second circuit, on the 10th day of October, 1865, before the honorable Samuel Nelson, one of the judges of the said circuit court, according to the form of the statute in such case made and provided, came on to be tried by a jury of the said southern district of New York, for that purpose duly impanelled, good and lawful men of the city and county of New York in said district. At which day came there as well the said plaintiff as the said defendants, by their respective attorneys aforesaid, and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue. And upon the trial of that issue, the counsel learned in the law for the said the
9 United States of America, to maintain and prove the said issue on their part, gave in evidence—

First. That said defendants, prior to and during all the month of April, 1865, were licensed under the provisions of the act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, as the same was amended by act of Congress approved March 3d, 1865, relating to licenses, and were doing a general business as bankers in the city of New York, making returns of and paying the duties and taxes imposed by the laws of the United States upon their capital and their deposits.

Second. The said defendants, during the same month of April, received directly from and negotiated and sold for the United States large amounts of government securities, known as "seven-thirties," upon and for which sales no duty is claimed or exacted by the United States.

Third. During the same month of April, the said defendants were general dealers in government securities, buying and selling them as opportunity offered, upon their own account and for themselves, and not for others, or for a commission. The business of said defendants during said month of April, and for a long time prior thereto, had been and was as bankers and general dealers in government
10 securities. During the said month of April they sold, as such general dealers, government securities held and owned by them, and in their own right, the duties upon which, if the same are subject to the duties imposed by the 99th section of the said act and

at the rate therein prescribed, amount to the sum of two thousand dollars, so as aforesaid claimed by the plaintiffs.

And thereupon the counsel learned in the law for the said defendants gave no evidence to maintain and prove the said issue on their part. Whereupon the said counsel for the said plaintiffs did then and there, on behalf of the said plaintiffs, insist before the said judge of the said circuit court that the said matters so produced and given in evidence on the part of the said plaintiffs as aforesaid were sufficient and ought to be admitted and allowed as decisive evidence to entitle the said plaintiffs to a verdict on the said issue between them and the said defendants so joined as aforesaid. And the said counsel for the said plaintiffs did then and there pray the said judge of the said circuit court to admit and allow the said matters so produced and given in evidence for the said plaintiffs to be conclusive in favor of the said plaintiffs to entitle them to a verdict in this cause. But to this the counsel for the said defendants did then and there object, and did insist before the said judge of the said circuit court that the same matters so given in evidence on the part of the said plaintiffs were not sufficient and ought not to be admitted or allowed to entitle the said plaintiffs to a verdict. And the said judge of the said circuit court did then and there declare and deliver his opinion to the jury aforesaid, that the several matters so produced and given in evidence on the part of the said plaintiffs were not sufficient to entitle them to a verdict in this cause. Whereupon the said counsel for the said plaintiffs did then and there, on behalf of the said plaintiffs, except to the aforesaid opinion and decision of the said judge of the said circuit court, and insisted on the said several matters as sufficient to sustain the said action on the part of the said plaintiffs and to entitle them to a verdict.

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And the said judge of the said circuit court did also, then and there, further declare and deliver his opinion to the said jury that the said defendants were not liable to pay the duties and rates of duty prescribed by the 99th section of the aforementioned act of Congress, as amended by the act of Congress approved March 3d, 1865, upon sales and contracts for sales of foreign exchange, promissory notes, gold and silver bullion and coin, and government and other stocks, bonds, and securities, owned and held by them in their own right, and sold upon their own account, and for themselves and not for others, or for a commission; to which last-mentioned opinion of the said judge of the said circuit court the said counsel for the said plaintiffs did then and there, on behalf of the said plaintiffs, duly except.

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And the said judge of the said circuit court, under the charge and with the instructions aforesaid, left the aforesaid issue and the evidence given on the trial thereof as aforesaid to the said jury; and the jury aforesaid then and there gave their verdict for the said defendants; and inasmuch as the said several matters so produced and given in evidence on the part of the said plaintiffs, and by their counsel aforesaid objected and insisted on, as sufficient to sustain the said action and entitle the said plaintiffs to a verdict, do not appear by the

record of the verdict aforesaid, the said counsel for the said plaintiffs did then and there propose their aforesaid exceptions to the opinion of the said judge of the said circuit court, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said plaintiffs as aforesaid, according to the form of the statute in such case made and provided. And thereupon the said judge of the said circuit
13 court, at the request of the said counsel for the said plaintiffs, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the sixth day of November, in the year of our Lord eighteen hundred and sixty-five.

S. NELSON. [L. S.]

Indorsed: U. S. circuit court. The United States *vs.* Harvey Fisk and Alfredrick S. Hatch. Bill of exceptions. D. S. Dickinson, U. S. dist. att'y. Filed Nov. 6, '65.

14 Supreme Court of the United States, of December term, in the year of our Lord one thousand eight hundred and sixty-five.

THE UNITED STATES OF AMERICA, plaintiffs in error,
vs.
HARVEY FISK and ALFREDRICK S. HATCH, defendants in error.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, come the said the United States of America, by Daniel S. Dickinson, their district attorney for the southern district of New York, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Harvey Fisk and Alfredrick S. Hatch against the said the United States of America, whereas, by the law of the land, the said judgment ought to have been given for the said the United States of America against the said Harvey Fisk and Alfredrick
15 S. Hatch; and the said the United States of America pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

D. S. DICKINSON,
U. S. Att'y, Southern Dist. of N. Y., and Att'y for Plaintiffs in Error.

Indorsed: U. S. Supreme Court. The United States, plaintiffs in error, *vs.* Harvey Fisk and Alfredrick S. Hatch, def'ts in error. Assignment of errors. D. S. Dickinson, U. S. dis't att'y and att'y for pl'ff's in error. Filed Nov. 16, '65.

16 Supreme Court of the United States.

HARVEY FISK AND ALFREDERICK S. HATCH, def'ts in error,
vs.
THE UNITED STATES OF AMERICA, pl'ffs in error.
} In error.

And afterwards, to wit, on the first Monday in December, in December term, in the year of our Lord one thousand eight hundred and sixty-five, the said Harvey Fisk and Alfrederick S. Hatch, by Elbridge T. Gerry their attorney, freely come into court and say that there is no error either in the record and proceedings aforesaid or in the giving of the judgment aforesaid, and he prays the said Supreme Court of judicature, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

17 ELBRIDGE T. GERRY,
Att'y for Defendants in Error, 54 Wall st., New York.

Indorsed: U. S. Supreme Court. Harvey Fisk and *als.*, def'ts in error, *ads.* The United States, pl'ffs in error. Joinder in error. Elbridge T. Gerry, att'y for def'ts in error. Filed Nov. 24, '65.

18 By the honorable Samuel R. Betts, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Harvey Fisk and Alfredrick S. Hatch:

Whereas the United States of America lately issued out of the Supreme Court of the United States a writ of error, directed to the judges of the circuit court of the United States for the southern district of New York, in the second circuit, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between the United States of America, plaintiffs, and Harvey Fisk and Alfredrick S. Hatch, defendants, a manifest error hath happened, to the great damage of the said the United States of America; and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, to be held at the Capitol, in the city of Washington, on the first Monday of December next; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 18th day of October, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the ninetieth.

SAM'L R. BETTS,
Judge of the U. States for the Southern District of New York.

19 Indorsed: U. S. Supreme Court. The United States, pl'ffs in error, *vs.* Harvey Fisk and another, def'ts in error. Citation. Service of the within citation and receipt of a copy thereof is hereby admitted this 19th day of October, 1865.

W. F. ALLEN, *Att'y for Def'ts.*

Filed Oct. 19, '65.

Record filed in Supreme Court December 1, 1865.

+

In the Supreme Court of the United States.

DECEMBER TERM, 1865.

THE UNITED STATES,
vs.
B. L. CUTTING, &c. } No. 311.

THE UNITED STATES,
vs.
HARVEY FISK, &c. } No. 312.

ARGUMENT FOR PLAINTIFF IN ERROR.

JAMES SPEED,
Attorney General.

In the Supreme Court of the United States.

DECEMBER TERM, 1865.

THE UNITED STATES, *vs.* B. L. CUTTING, &c. } No. 311.

THE UNITED STATES, *vs.* HARVEY FISK, &c. } No. 312.

ARGUMENT FOR PLAINTIFF IN ERROR.

Can a licensed broker, or banker doing business as a broker, sell, or contract to sell, the things mentioned in the 99th section of the act of the 30th June, 1864, as amended by the act of the 3d of March, 1865, when they are his own property, sold for his own account, and not for others or for a commission, without paying the duty and rates of duty imposed by the act? This is the sole question before the court in these cases.

This question must be answered by the statute. In order to understand the act as it now stands, it will be well to see what it was before it was amended.

In the 9th subdivision of section 79 of the act of June 30, 1864, (see Acts, page 252,) the word "broker" is defined; it reads as follows:

"Brokers shall pay fifty dollars for each license. Every person, firm, or company, (except such as hold a license as a banker,) whose business it is, as a broker, to negotiate purchases or sales of stocks,

exchange, bullion, coined money, bank notes, promissory notes, or other securities, shall be regarded as a broker under this act, and shall make oath or affirmation, according to the form to be prescribed by the Commissioner of the Internal Revenue, that all their transactions are made for a commission: *Provided*, That any person holding a license as a banker shall not be required to take out license as a broker."

A broker is thus defined to be a person whose business it is to negotiate purchases and sales for others, and not on his own account. What he might do for himself in the way of purchases and sales would not be done by him as a broker within the meaning of the statute.

Then, by the 99th section of the act, (see page 273,) all brokers, and bankers doing business as *brokers*, shall be subject to pay certain duties and rates of duty upon sales of merchandise, &c.

According to the definition of "broker," as previously given in the statute, the duties imposed by the 99th section could only be levied upon the transactions which a person might make as broker for others, and could not be levied upon transactions in regard to his own property for his own account, and not for a commission.

Such was the law under the act of June 30, 1864, before it was amended.

The 9th branch of the 79th section of the act of June 30, 1864, was amended by the act of the 3d March, 1865, (see Acts, page 472.) As amended it reads as follows:

"Every person, firm, or company, except such as hold a license as a banker, whose business it is as a

broker to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or other securities, for themselves or others, shall be regarded as a broker under this act: *Provided*, that any person holding a license as a banker shall not be required to take out a license as a broker."

The difference betwixt the definition of "broker," as given in the original and amended act is, that by the original act none were brokers except such persons as transacted business for others; whereas by the amended act all persons who make a business of negotiating purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or other securities, for *themselves* or others, must be regarded as brokers for the purposes of the act. It is not necessary that such dealing should be their sole business: the same man may have various avocations, but, if dealing in the things mentioned above be one, he is a broker under the act.

The 99th section of the act of the 30th of June, 1864, was also amended by the act of 3d of March, 1865, (see Acts of 1864–'5, page 478.) The amendment is only as to the duties and rates of duty, and does not affect the question before the court.

The 99th section declares that "all brokers, and bankers doing business as brokers, shall be liable to pay the following duties and rates of duty," &c. The word "brokers," as here used, must mean the persons described in the 9th branch of the 79th section as amended. By that, all persons who make a business of dealing in stocks, &c., whether for *themselves* or others, are brokers, and liable to pay the duties imposed.

As, before the amendment, it was plain that persons who sold their own stocks could not be taxed thereon, because, as to such stocks, they were not brokers within the meaning of the original act, so, since the amendment declaring all persons to be brokers who make a business of dealing in stocks for themselves and on their own account, it would seem equally plain that sales on their own account of their own property are subject to the duties. The proviso to the section 99 only imposes an additional penalty upon persons who shall, without license, undertake to act as brokers for others, and does not conflict with the view of the statute which I have given.

The Judge who tried the case in the court below having instructed the jury that the defendants were not liable to pay the duties and rates of duty prescribed by the 99th section of the act of Congress as amended by the act of the 3d of March, 1865, upon sales and contracts of sales of foreign exchange, promissory notes, gold and silver bullion, and coin, and government and other stocks, bonds, and securities, owned and held by them in their own right, and sold upon their own account and for themselves, and not for others or for a commission, the instruction was excepted to.

For error in this instruction a reversal is respectfully asked.

JAMES SPEED,
Attorney General.

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Supreme Court

OF THE UNITED STATES.

THE UNITED STATES, *Plaintiff in error,* vs. HARVEY FISK & ALFREDRICK S. HATCH, *Defendants in error.*	No. 312. *Defendants' Brief.*

Error from Circuit Court of the United States for the Southern District of New York.

This action was tried at the same time with that of the same plaintiff against Robert L. Cutting and others (No. 311) upon the present Calendar of this Court.

The opinion pronounced upon deciding the two cases at the Circuit was written and entitled in this action.

A copy is annexed to the defendants brief in No. 311, to which reference is made.

Both actions were for duties claimed to be due and payable under the 99 section of the "Internal Revenue" Act of 1864, as amended in 1865, upon sales of securities, &c., made in April, 1865.

The only distinction between the two cases are:

(1.) The present defendants were licensed as "Bankers," and carried on the business of banking and nothing else, and did not act as "Brokers," while the defendants in No. 311 were licensed as "Brokers," and did business as such as well as on their own account.

(2.) The sales by the defendants in this action, upon which a duty is sought to be recovered, were of Government securities only, and these were held and owned by them in their own right, while the sales by the defendants in No. 311 embraced other stocks, bonds and securities as well as "Government securities."

The facts upon which the question arose at the Circuit are stated in the Bill of Exceptions. (Fol. 9, 10.)

The defendants were licensed as Bankers, and did a general business as such in the City of New York, making return of and paying the tax upon their capital and deposits.

In April, 1865, they, acting for the United States, negotiated and sold large amounts of general securities, and for these sales no duty is claimed.

It does not appear that in any instance they acted as Brokers.

During the same month of April they were general dealers in Government securities upon their *own account solely*, and "*as such general dealers sold Government securities held and owned by them in their own right.*"

Upon the trial the Judge ruled that the defendants were not chargeable with the duties provided by the said § 99 of the Act for or in respect to these sales last men-

tioned, and upon an exception to that ruling and decision, the case is presented to this Court, a verdict and judgment having passed for the defendants, and error having been brought upon the judgment.

A reference to paragraph one of § 79 will show what business bankers were authorized to do by virtue of their licenses; and a reference to § 110 will show that, in addition to the license, bankers are obliged to pay a monthly duty on the average amount of their capital, and also a monthly duty on the average amount of deposits, and it will also be shown that the amount invested in Government securities is to be deducted from the amount of capital taxed.

POINTS AND BRIEF.

FIRST.—Neither Brokers nor Bankers are chargeable with duties upon sales of stocks, bonds, securities, &c., *bona fide* held and owned by them in their own right at the time and sold on their own account.

In support of this proposition we respectfully refer to the brief and arguments in the case of Cutting *et al ads.* the United States, (No. 311).

If Brokers are exempt from taxation upon sales of their own stocks, &c., it needs no argument to prove that Bankers who, under their license as Bankers, do business as Brokers, are not taxable for like sales of their own stocks. It cannot be claimed that Bankers are in worse case than Brokers proper.

SECOND,—*But* the defendants were neither "brokers," nor "bankers doing business as brokers." The case shows that the defendants did *no business as brokers.* They were general bankers, and bought and sold government securities upon their *own account, and not for others.*

(1.) These transactions in government securities did not require a license under section 79. They could have been carried on by any one and without a license. A license is required only when moneys are advanced or loaned on stocks, &c., or when they are received *for sale or discount.* The defendants in error never have "received stocks, bonds, &c." or made loans or discounts thereon, and it is only in such transactions that a licence is required.

(2.) Even if they had received stocks, &c., for sale, and sold them for others, they would not have been "brokers" by reason of such transactions, either within the ordinary or statutory definition of that term. They might have been in respect to such transactions, dealers upon commission or agents, but not brokers. Under the act they are *bankers* and only *bankers.*

(3.) They did not, under the act, become *brokers* by reason of any act or transaction which is classed by the act with the "business of bankers" or which is made by the act "banking business," or which they were authorized to do by virtue of their license as bankers.

(*a.*) Those holding a license as a "banker" (and the defendants held such a license) are expressly exempted from the statutory definition of a broker by paragraph 9 of section 79.

(*b.*) The business of a banker as described and defined by paragraph 1 is not that of a broker, as

defined by paragraph 9 of section 79. A banker, as such, is authorized to receive stocks, &c., for sale. A broker is one who "negotiates" sales either "for themselves or others." To negotiate is the appropriate business of a "broker." It requires something more than the mere buying or selling for another to constitute a broker, otherwise a commission merchant, who buys and sells on commission, would be a broker. A broker is one who negotiates transactions *between* other parties, and acts the as middle man or go-between. Story Agency, § 28.

Again, the duties imposed by section 99 are not charged upon *all bankers* as they are in terms upon all brokers. They are only charged upon "bankers doing business as brokers," that is, *when and upon the transactions in which* they act as brokers. This was the construction of the act by the public authorities, prior to 1865, and the language of this section in this particular remains, as in 1864. The words having a definite meaning at the time the act was passed, a different effect will not be given the section so long as it remains unaltered by the legislature.

(*c.*) The only color for supposing that a banker becomes a broker or does "business as a broker," even when performing acts authorized to be done by a broker, under the ninth paragraph of section 79, is the proviso to paragraph 9 exempting persons holding a license as a banker from the necessity of taking out a license as a broker. The only effect of that is to leave "bankers" and individuals holding a license as bankers in the same position as if there was no license required for the business of a broker. They are expressly excluded and exempted from the defi-

nition of brokers, and the operations of that paragraph in all respects.

(*d.*) Bankers are expressly and in terms excepted, as well from the definition of "brokers," as given by section 79, as from the operation and effect of subdivision 9 of that section, declaring who are "brokers," and to be deemed as such. Every person carrying on certain businesses, "EXCEPT SUCH AS HOLD A LICENSE AS A BANKER," is to be regarded as a *broker*

It follows that a person holding a license as a banker is not for any purpose to be regarded as a broker merely because he is engaged in the particular business mentioned. Indeed it is declared that he shall not be regarded as a broker.

(4.) Bankers when they "receive stock, &c., for sale" act *as bankers and not* as brokers, and are therefore not taxable for any sales of stock, &c., so received by them for sale. It follows that they are not taxable upon their own sales.

The act, so far as bankers are concerned, is as if subd. 9 of sect. 79 was out. An individual is required to have a license to enable him to receive stocks, &c., for sale, and when he does receive and sell he is a "banker."

Subdivision 9 cannot, by any act of the Court be transferred to and made a part of subdivision 1, neither can the exception in subdivision 9 be qualified, modified or stricken out. It must bestricken out in order to change the construction of section 99 as to bankers.

(5.) Sub. *one* of section 79 and section 99 read together, ommitting sub. 9, as is entirely proper

will relieve bankers from the tax sought to be imposed.

(6.) By § 99 Bankers are only taxable for sales and contracts for sales of stock, &c., when "doing business as Brokers." If the transaction is a legitimate "*banking* business" it is excluded from the "business of a Broker." The qualification of the description of persons subject to the tax upon their sales, "*Bankers doing business as Brokers*" excuses Bankers frem the tax except *when* they *act as Brokers*. Bankers are not taxed upon all their sales, but only on those made as Brokers. They only act as Brokers when they "negotiate" sales for others. It would be a violation of the letter and spirit of the Act to tax them upon sales made in their own right. It would in effect strike out the qualification of the statute, "doing business as Brokers," and make the Act to read as the Legislature did not enact it. It would be as if it read, "Bankers shall pay a duty upon their sales, whether made by them as individuals and of their own property, or as bankers of stock, &c., received for sale, or as brokers negotiating sales in behalf of others." Such a radical change in the statute in intent should be the work of the Legislature and not of the Court.

THIRD.—The defendants were dealers in Government securities only. They bought and sold such securities for themselves and not for others, and by these transactions tended to give currency and value to the Government debt, making it marketable and available to the holder, and a more desirable investment by enabling the holder at all

times to convert it into money. This readiness of conversion was a principal cause of the popularity of the Government loans, as they were put upon the market.

The presumption is, therefore, against any intent of the Government to tax sales of its own securities.

FOURTH.—The policy of the Government is and has been to exempt its securities from every tax and burthen, and the reason is obvious. Moreover, they are exempt from State and municipal taxation, and it is not to be presumed that it was the intention of Congress to embarrass their sale by imposing a burthen and tax which would greatly depreciate their market value in the hands of a particular class of citizens.

FIFTH.—In conclusion, and by way of recapitulation, we submit this general proposition—

Bankers are not liable to pay duties on sales of stock and securities belonging to themselves and made for their own account and not for others.

1. Under the Revenue Act, Bankers are liable to pay duty on sales made by them *only when doing business as Brokers.*

2. If any license be required to make sales of stocks owned by themselves and on their own account, which we deny, the Bankers license is sufficient

therefore, and under such license Bankers are expressly authorized to make them.

3. Such sales form no part of the business of a Broker.

4. Being authorized to make such sales without license or by virtue of their license as BANKERS, even though the same acts may be done by Brokers under their license, the sales are made by the Banker *qua* Banker and not as Broker, and therefore not taxable.

And in reference to the particular case before us, we submit that the judgment herein should be affirmed, because it appears—

(1.) That the defendants in error are not brokers and do not carry on the business of brokers, but are bankers and nothing else, doing the business, which by their license as bankers, they are authorized to do, and nothing more.

(2.) That they are dealers in Government Securities and nothing else, and that in all cases where they have not acted as the agents of the Government, they have acted for themselves and on their own account, and not for others.

3. That assuming Government securities to come under the denomination of "Stocks, Bonds, or other Securities," it was not the intention of Congress to levy a tax upon operations in Government securities, and that the whole policy of Congress has been to exempt such securities and operations therein from any burthen or tax

which might interfere with the ready disposition of such securities, and to aid and promote their availability and negotiation, and thus render them a desirable investment for the people.

W. F. ALLEN,
JOHN E. BURRILL,
J. C. BULLITT,
WM. M. EVARTS,
Of Counsel for Defts'. in error.

Supreme Court

OF THE UNITED STATES.

THE UNITED STATES, *Plaintiff in Error,* vs. ROBERT L. CUTTING, ROBERT L. CUTTING, Jr., and JAMES D. W. CUTTING, *Defendants in Error.*	No. 311. *Brief of Defendants in Error.*

Error from the Circuit Court of the United States for the Southern District of New York.

Action by the United States to recover certain moneys claimed to be due from the defendants under the provisions of § 99 of the "Internal Revenue Act" of June 30, 1864, as amended by the Act, approved March 3, 1865.

Upon the trial it appeared the defendants were, during the month of April, 1865, duly licensed as brokers and doing business as such in the City of New York, as partners under the firm name of R. L. Cutting & Co.

That they did during such month of April, negotiate purchases and sales of stocks, bonds and securities as brokers, and acting for others, and made report of all such sales to the proper assessor, and were charged with the duties thereon as imposed by § 99 of the Internal Revenue Act.

The right of the plaintiff to these duties is conceded, and they are not claimed in this action.

During the same month the defendants sold on their own accounts and for themselves, stocks, bonds and securities, of *which they were the owners at the time.* This action, is brought to recover the duties prescribed by said § 99 upon the last mentioned sales.

The Judge at the Circuit ruled and decided that the defendants were not liable to pay the duties and rates of duty prescribed by said 99th section, upon sales of stocks, securities, &c., *owned and held by them in their own right, and sold on their own account, and for themselves and not for others,* or for a commission, and to this ruling and decision the counsel for the plaintiff excepted.

A verdict and judgment passed for the defendants, and the plaintiff has brought error thereon.

The action was tried at the same term with another action against Fisk and Hatch, which is on the present Calendar of the Court, (No. 312.)

The opinion in the two cases is annexed to this brief.

NOTE.—A question arose in 1864, as to the liability of "Brokers" and "Bankers" doing business as Brokers, to pay a duty under § 99 upon sales of their own stock, &c., and was submitted to the Department. The decision of the Commissioner of Internal Revenue exonerated the parties from the duty. A copy of the letter of the Commissioner makes a part of this brief, and is submitted as a part of the official history of the tax, and as bearing upon the construction of the amendments to the Act in 1865.

Section 99 was not amended in 1865, except by altering the rate of duty upon sales of gold and silver bullion and coin.

POINTS AND BRIEF.

I.—It is undisputed, and such is in substance the statement in the Bill of Exceptions, (fol. 9, 10,) that the stocks, bonds and securities sold by the defendants, in respect to which the duty is claimed in this action, were *at the time of the sale, bona fide their own property, and actually on hand.*

The suggestion has been, that the design of the originator of the amendment in 1865, to paragraph 9 of § 79, which, with the proviso to § 99, is relied upon to sustain the claim now made, was to subject to the duty imposed upon "Broker's" sales all contracts for the sale of stocks deliverable at a future day, "*short sales*,"—such transactions being supposed not to be regular business transactions, but rather wagers upon the price of the stock, or security at the day named for a delivery, and as not contemplating an actual delivery of the thing sold.

The question is not involved in this action, except perhaps, as bearing incidentally upon the interpretation of the Act, as affecting regular sales by brokers of their own stocks, &c. If the provisions of section 79, paragraph 9, are to be called in aid of the construction of § 99,—the legal effect of the amendment of the former section might be to subject "short sales" to the duties imposed by § 99, and the amendment may have been properly worded to accomplish the intent of its framers, and in a way not to attract notice and court opposition.

II.—Prior to the amendments of 1865, the Act was har-

monious in all its parts, and free from ambiguity in all its provisions affecting "Brokers" and "Bankers doing business as Brokers. *Brokerage transactions proper*, that is to say—*sales negotiated by "Brokers"* as such, and for others, whether acting under a Broker's or Banker's license, were alone subject to the duty imposed by § 99. Every other sale was excluded from the operation of the section, by force of the terms employed, and every part of the Act was consistent with § 99, thus understood. The entire Act, read as a whole, clearly indicated the intention of the legislature to tax the business of "*Brokers*," and to leave the transactions of "dealers" entirely untrammelled and unburthened, notwithstanding the same individual might be both "dealer" and "*broker*,"—that is, buy and sell for himself, and negotiate for others.

(1.) The office and business of a "broker" was well understood, and the terms as used in the section imposing the duty, must be taken to have been used in its popular sense. Especially, when the popular understanding of a word coincides with its legal and technical signification, effect must be given to it in a Statute, according to its ordinary signification, unless a different meaning is given to it upon the face of the Statute. The legislature must declare expressly or by necessary implication, that it is used in a different sense.

Elliot *vs.* Swartwout, 10 Peters, 152.

A "*Broker*," is one whose business is to *negotiate* purchases and sales, or other transactions for others.

Bouvier's Dic., "Broker."
Story on Agency, § 28.

The business of buying and selling upon commis-

sion, is entirely distinct from the business of a broker.

Com. Dig., Merchant, C. And see paragraph 14, § 79 of the Revenue Act.

It follows, that a "broker's sale," or "sale by a broker," is a sale negotiated by a "broker," *qua* broker and for others. The definition necessarily excludes all sales made by an individual for himself, and of his own property. The language of the section is—"*All brokers and bankers doing business as brokers, shall be subject to pay the following duties and rates of duty upon the sales, &c.*" That is, all sales made by them *as brokers.*

The provision was designed to reach and tax a *business*—a particular *class of transactions*, and not to discriminate against a *class of persons.* To hold otherwise, is in effect to declare, that the terms "brokers" and "bankers," are merely *descriptiones personarum*, and that all sales by persons answering the description are taxable.

For example—an individual having a license, and doing business as a stock broker, and having also a farm, is taxable upon the sales of his produce. And a "banker" having an interest in a country store, is taxable upon the sales of his merchandise. Upon the same principle, a "produce broker," or broker of any other description, is liable for all sales of stocks, securities, merchandise, or produce, no matter how foreign the transaction may be to his business as a broker. Upon a like construction, a statute imposing a tax upon, or in any way regulating sales by executors or administrators, would apply to, and control sales by individuals answering the description made in their own right.

(2.) If referenee to other parts of the act is allowable in the interpretation of § 99, (which we deny) they will be found to have been in entire harmony with the view taken —that the intent was to regulate and control and tax a *business* and not to tax *persons* except in respect to that business. The Legislature could not more emphatically or distinctly have declared an intention to tax only a certain class of transactions, and by a proper and discriminating use of language confine the tax to the sales of a "broker" as *such*.

III.—Prior to the amendments of 1865, the act had received a practical construction to the same effect as that claimed for it as above, and the proper executive department had, upon deliberate examination, given it the same interpretation. The act had, from its passage in June, 1864, to March, 1865, been executed, and effect had been given to it according to the view of its meaning. This alone would be high evidence of the true interpretation of the act. It was not only a cotemporaneous construction, and by those participating in framing and enacting it. It was also a construction by those entrusted with its execution, and who leaned in favor of the Government in giving effect to its provisions, and who gave the Government the benefit of every doubt in its interpretation. Had there been room for doubt a different construction and effect would have been given to the act in August, 1864, and from that time onward.

IV.—This practical as well as official construction

received the Legislative sanction by the action of Congress at the Session of 1864-5. The construction of the Act by the executive officers of the Government, and that by the express directions of the Commissioner of International Revenue, Brokers and Bankers, as well as others, had been exempted from any tax or duty upon sales of their own stocks was necessarily understood and fully known to the Legislature, and especially to the members of the committee having in charge the subject of Internal Revenue. The tax was imposed by § 99, and by no other clause of the Act. Any defects or omissions in the Act, or any misinterpretation by which classes of individuals or business manufacturers were unduly exempted from taxation would, as, of course, have been amended, corrected, and supplied by an amendment of the section imposing the tax and declaring the persons and transactions chargeable. But no amendment was made either to correct a misinterpretation or misconstruction by the Revenue Officers, or to cure any supposed defect in the Act in this respect. A higher and more conclusive evidence of the positive sanction of the construction by Congress and of a disinclination to change the Act is found in the deliberate rejection of a proposition to tax "all sales of stocks by brokers and others."

Cong. Globe, 1865. p. 876, 878.
Sedgwick on Statutes, 239.

V.—No change was made in the act by the amendments of March 3, 1865, subjecting the individual transactions of brokers and bankers acting in their own right, to the tax which was before restricted to their transactions as brokers, or in any way giving a new or more stringent effect to the section.

(1.) Assuming the true construction of the act prior

to the amendments of 1865, to be that claimed for, and given to it, as above stated, an intent of the Legislature to give a different effect to it would be accomplished directly and by an appropriate amendment to the section imposing the tax. It must be assumed that the Legislature act without concealment and disguise, and in the most natural and direct way to effect a change in the statute laws. It would be an impeachment of their wisdom and good faith to assume that they essay to do covertly and indirectly that which could be better done openly and directly. It would convict them of an inability to declare their intent in proper terms, or of an attempt to deceive each other and mislead the people for whose direction and government the law is enacted. It is improper, therefore, to resort to *amendments* of other parts of the act, for the purpose of aiding, by implication, a section which was not amended, the main and only purpose of which was to legislate upon the particular subject. It should be noted that in another particular the section was amended, showing the care with which the work of revision and amendment was done, and that the omission to amend in other respects was not an inadvertence or mistake.

(2.) This is not a case permitting a reference to other parts of the act, or the amendments to other parts of the act, to aid in the interpretation of the 99th section.

(*a*) The language of § 99, standing by itself, is entirely free from ambiguity, and the only doubt there is attempted to be cast upon it is created by a reference to other provisions of the act, treating of an entirely different branch of the same general subject of revenue, and then to call in aid the same provisions to solve the doubt thus created. This is not allowable. When the

words, employed have as here, a clear and well defined meaning, there is no room for interpretation. Extrinsic aid cannot be resorted to.

Per Johnson J. Newell *vs.* People, 3 Seld. 97.
McCloskey *vs.* Cromwell, 11 N. S. R., 590.

"It is the duty of all courts to confine themselves to the words of the Legislature, nothing adding thereto, nothing diminishing."

Per Tindall, C. J. Emmett *vs.* Wells, 2. Scott, N. R., 531.
Jones *vs.* Hansard, 6 Exch. R. 328, 333.
Smith on Statutes, &c., 329.

(*b.*) It is only in case of doubt attaching to a particular clause that other parts or the whole statute may be referred to in aid of the interpretation. Other parts of a statute may be called in aid to interpret or give effect to a particular clause;

(1.) To avoid any contradiction or inconsistency between the different parties, and

(2.) To give *some* effect to every part.

Sedgwick on Statutes, 237.
Commonwealth *vs.* Duane, 1 Binn. 601.
Commonwealth *vs.* Alger, 7 Cush. 53, 89.
Attorney-General *vs.* Detroit & Erie R. R. Co., 2 Mich. R. 138.

(3.) It was not within the intent or the effect of the amendment of paragraph 9 of § 79 by the insertion of the words "for themselves or others," to amend or change the construction or legal effect of § 99.

(*a.*) The claim is to engraft an important matter upon the main provisions by implication and in-

ference from an amendment in an inconsiderable matter of a less important provision, and that only relating incidentally and not directly to the subject matter of the principal section left untouched. The omission to change the reading of § 99 is conclusive evidence that it was not intended to amend it or alter the effect or practical construction.

(*b.*) If this unusual method of amending § 99 and enlarging the range of taxation under it had been resorted to, then paragraph one of § 79 would have been amended so as to declare those who held stocks of their own for sale as well as those who received them from others for sale "bankers," and thus in terms placed brokers and bankers upon the same footing.

(*c.*) A careful review of the act, its phraseology and construction, the purpose and object of the different parts will show that the intent of the amendment to paragraph of § 79 was simply to enlarge the class of persons to be licensed.

(1.) The act was by the Legislature divided in reference to the several subjects acted upon, and such subject matter made the subject of a distinct part. The several parts of the act are distinct, and each as perfect by itself, as if the several parts had constituted distinct chapters, or statutes, having no connection with each other. It was so divided in its passage and is so divided as published in the authorized edition of the Statutes.

Statutes at large, page 223.

It is a matter of history, that *the* different portions of the act were in truth, prepared as independent provisions by different committees or sub-committees, and each was intended to be perfect by itself. For example:

Section 1.—Relates to the Commissioner, his duties, salary, &c., and if enacted by itself, would have been a complete statute, capable of execution.

Section 2.—52, entitled "General Provisions," relate to the bureau and its officers and agents, and arrange the machinery. This portion of the act is also complete by itself.

The other portions of the act assess the duties, declares the taxes, &c.

Sections 53–70.—Entitled "Spirits, Ale, and Porter," provide for the license of brewrrs, distillers, &c., and the duties to be paid by them on their products, and provide penalties, &c.. and regulates the modes of procedure, affecting that particular branch of business and no other.

Sections 71–84 — Entitled, "Licenses," prescribe the business for which, and the persons by whom licenses must be had, and the fee to be paid therefor. This part of the act, like every other part, is complete by itself and is no way connected with any other part of the act, by reference or otherwise. Subsequent sections regulate the business and prescribe duties, taxes, &c.

It is the same throughout the entire act.

(2.) The designation of those who shall be regarded as *brokers* by sub 9, of § 79, is only for the purposes of, and with respect to a license. This is evident from the construction of the sub-division, as well as its place in the act relating to licenses.

(3.) The words, "under this act." in the clause, upon which great stress is laid in this controversy, do not change or give a new meaning to the language of § 99, or any other part of the act.

(*a.*) These words were in the section as it stood 1864, when it was not claimed that they had or

could have any effect, except as to licenses. They were not a part of the amendments of 1865. It cannot be claimed therefore that they have any greater effect than they had in the act of 1864.

(*b.*) The language employed has full force and effect by regarding it as applicable to that part of the act relating to "Licenses," and regarding the act as if it had said "for the purposes of a License," or "under this provision."

The definition was inserted in that connection solely for the purpose suggested, and it should not be extended by implication for the purpose of increasing the burthens of the citiaen, or in restraint of trade. The clause does not occupy the place or have the prominence in the act which it would have had if had been designed to give character to the word "broker" whenever used in any part of the act.

For examples of interpreting clauses or statutory definition of terms or words.

See New York Revised Statutes at pages referred to under title "definition" in the index.

St. 3 & 4, Wm. 4, ch. 27 §§ 1, 8. 4 Ann ch. 16, § 24.

(4.) Interpretation clauses do not in all cases restrain or curtail the meaning of words.

Doe *v.* Benham, 7 A. & E. N. S. 976. And while judges disclaim the right to assign different meanings to the same words in acts of parliament they will do so when necessary to give a fair and reasonable construction to the language used.

Reg. *v.* Coms. of Poor Laws, &c., 6 A. & E. 68.

It will be done when one clause applies to a particular case, and another is conceived in general terms.

Per Buller, J., 2 T. R. 164.

And although different statutes or different parts of the same act relate to the same person or thing they are not strictly in *pari materia*, and to be read in connection, unless they also relate to the same subject matter.

5 T. R. 16.

It follows that section 79 and 99 are not for any purpose to be incorporated together—the one relates to licenses to persons, the other to a tax on business and business transactions

(5.) This is within the rule laid down in Hobart's Rep., and followed, as reported, in Parker's Rep. "As one chapter in a statute may be both general and particular, because one chapter contains divers acts and laws which may be as several in their natures as if they were in several chapters; so, by parity of reason when there are different provisions for different purposes, and penned in different words in the same chapter they ought to be so construed to avoid inconsistency, as if they had been in different chapters."

Bac. Ab. Statutes, I, 2. Hob. 226.

Atty-General *v.* Allgood, Parker's Rep. (Exch. 1743), page 1, 3, 44.

The question in the last case arose under St. 4 Ann C., 16.

Sections 4 and 5 authorized double pleading in certain actions.

Section 24 declared that the act and all the statute of joefails should extend to all suits in any of her Majesty's courts of record at Westminster

for the recovery of any money owing or any money belonging to her majesty, her heirs or assigns.

Ch. B. Parker said, "The meaning of the words that this act and all the statute of joefails shall extend to the cases therein mentioned, cannot be that all the clauses of the act shall extend to them, because many of them have not the least relation to the proceedings of the crown in courts of justice. If not all, then the question will be, what clauses? I answer, such clauses as are of the same *nature and tendency as the 24th* section itself, and that is to aid and assist the proceedings of the crown;" and held that the 4th and 5th sections did not apply.

It was held that the rule was the same as it would have been if §§ 4 and 5 had been parts of parts of another statute.

In other words the Court construed the Act in reference to its object, and purpose and gave it and every part of it a reasonable construction in reference to the object and purpose of such part thereof.

(6.) It being conceded that § 99 had a definite meaning and effect when enacted, that meaning and effect will not be varied until the Legislature makes some change in the phraseology, or in some other way in express terms declares its intent to vary the construction and effect of that particular section.

VI.—The rules of interpretation and construction of statutes, and especially those applicable to Revenue Acts, forbid the construction claimed in behalf of the Government.

(1.) Bankers and brokers had been held not taxable for sales of their own stocks, &c., under § 99. Bankers were defined by one subdivision and brokers by another, and both subjected to a certain duty upon one class of their transactions. The subdivision relating to brokers was amended by enlarging the class to be licensed, but the other clauses referred to were left untouched. It is palpable that the Legislature did not intend to effect any change in the operations of § 99, and its effect will not be extended by implication.

Bell *v.* Dole, 11 J. R., 163.

(2.) The act of 1864, as will be seen by the amendments made in 1865, was revised by Congress, and the act as now in force may well be regarded as a *revised* act. The rule in such cases is, that a mere change of phraseology shall not be deemed a change in the law unless it evidently appears that such was the intention of the Legislature.

Taylor *v.* Delaney, 2 Cai. C. in E., 143.
Goodel *v.* Jackson, 20 J. R., 693.
In Matter of Brown, 21 W. R., 316.
Theriat *v.* Hart, 2 Hill, 380.

It is very evident that had Congress in the revision intended to subject bankers, who were also dealers in stocks, to the duties prescribed by § 99, it would have been done by an alteration of that section, and not by an unimportant change requiring dealers in stocks, who are not bankers, to take out licenses as brokers, or they would have adopted the proposition to tax such sales.

(3.) The same strict rule of interpretation is to govern in the construction of these amendments to the Act of 1864, that controls in the interpretation of all Revenue Acts. Acts of that character are never

construed beyond the natural import of the language, and duties are never imposed upon a doubtful interpretation, and the benefit of every doubt is given to the citizen.

Adams *vs.* Bancroft, 3 Summer, 387.
Taylor *vs.* United States, 3 How., 109.
Hubbard *vs.* Johnson, 3 Taunt., 177.
Dwam's on Statutes, 641.
Rawden *vs.* Gibbs, 1 B. & C., 319, 324.
Gray *vs.* Shilling, 2 B. & C., 30.

Acts of this character imposing duties, burthens and restrictions upon the business of the citizens, will not be extended by implication.

Brittano *vs.* Campfield Canal Co., 2 B. & Ald., 139.

Leeds & Liv. Canal Co., *vs.* Hutton, 1 B. & C., 424.

Carter *vs.* Holmes, 2 B. & Ald., 593.
Blanford *vs.* Morrison, 11 A. & E. N. S., 724.

The application of the Act will be restricted to cases within its spirit as well as its words.

Shoemaker *vs.* Lansing, 17 W. R., 327.

Even a palpable evasion of a Stamp or Tax Law, if so effected as not to bring the case within the terms of the Act, will be sustained.

Hawkins *vs.* Clutterbuck, 2 C. & K., 810.

At the best, it is mere surmise and conjecture that Congress intended to enlarge the class of transtions that should be chargeable with the duties imposed by § 99, and taxes will not be imposed upon a conjecture that the Legislature may have so intended.

VII.—It is submitted the words "for themselves," have no legal effect or meaning in the connection in which they stand in paragragh 97, § 79, but if it is claimed that some effect must be given them, then we contend that the most that can be claimed under the amendment, as affecting § 99, and enlarging the list of taxable transactions is, that the precise effect which it is claimed was contemplated by the authors or suggestors of the amendment, has been accomplished, to wit: contracts for sale of stocks, &c., not owned by the vendor, but deliverable at a future day, are taxable as sales by brokers, and to effect this end, the paragraph as amended must be read in connection with the *proviso* to § 99, and even then the intent is not declared but has to be "*spelled out.*" It must be assumed that Congress had respect to the right use of terms, and the apt use of language, and employed that which would most nearly express its meaning.

Section 99 recognizes the distinction between "sales and contracts for sales." Only *actual "sales" of merchandise* and produce and other goods are taxable, but "*contracts* for sales," as well as actual "sales of stocks, bonds, &c.," are taxed. This the Legislature may have had in view when they amended § 79, paragraph 9, with a view to tax "short sales." They vest in contract, that is the sale has been "negotiated." A sale is one thing—a negotiation for a sale is another. A sale is accomplished when the contract of sale has been executed and the property and possession has passed to the purchaser. A sale has been negotiated when a valid contract has been made for a sale in the future. A negotiation of sales is the business of a broker, and the term "by accommodation," may be applied to a contract for sale made by one acting for himself to be executed and accomplished in the future. Paragraph 9, § 79, makes those who "*negotiate* sales, &c.," brokers—not those who actually sell, although the sale includes the negotiation. It must be conceded that the reading of the

statute in the view taken of it by the plaintiff, is not free from doubt, and in such case it is allowable to refer to the ground and causes of the amendatory Act.

Dukedom of Sussex, 8 London Jurist, 795.

VIII.—It is inconsistent with the whole policy of the Act to tax sales of stocks and securities when made by the owner or dealer, and without the intervention of a third person.

(1.) It is not claimed that the sales of stocks and securities generally are taxable and there is no reason to suppose that the Legislature intended to discriminate between different classes of citizens and impose a burthen upon one class, from which every other class is exempt; to make the property of one worth less to him by the amount of the duty than property of the same kind is worth to his neighbor.

(2.) There is no reason why a duty should be imposed upon the sales of stocks, &c., and of no other property; and if any reason existed and was acted upon, the duty would have been imposed upon all sales, and not upon sales by a small class, leaving sales by the great majority free.

(3.) If sales of their own stocks, &c., by brokers and bankers doing business as brokers, are taxable under § 99, then sales by "produce brokers," "commercial brokers," and perhaps others are chargeable with duties. But the authorities concede that they are not within the provision of § 99 except as to their sales *as brokers* upon the ground that they have to take a license "as dealers," to

enable them to buy and sell on their own account. This only shows that the law recognizes the two capacities and characters in the same individual, that of "broker" and "general dealer," which is the distinction we contend for.

Whether the one business or the other is carried on with or without a license is immaterial.

(4.) The whole policy of the Act is to tax *profits of a business*, and not to tax commercial transactions in detail. Thus, brokers acting for a commission are charged with a duty bearing a small proportion to their commissions.

The commission is certain. The same may be said of auction sales, and yet an auctioneer doing business also as a dealer, pays a duty only on his auction sales, and not upon his sales as a dealer.

If the Statute in any case taxes a business in detail, the tax is general and imposed upon all without distinction as to any other calling or pursuit of the individual.

IX.—The tax upon sales of stock by the general dealer is onerous, and if enforced will greatly contract, if not destroy the business.

The business of the Stock Exchange is important and beneficial to the country. The facility and certainty with which stocks and securities can be sold and converted into money, materially enhances the value of that species of property, and has greatly aided and still aids the Government in making market for its vast indebtedness.

The general dealer trades always on a small and not unfrequently upon a doubtful margin. The transactions about as often result in a loss as in a profit, and in the

dealings of a year the entire profits would seldom equal the tax now sought to be imposed and enforced. The transactions are necessarily very large, and $\frac{1}{20}$ of one per cent. upon the annual transactions of any general dealer, would make a very large sum; so large that any dealer who should make it by way of profit on his own purchases and sales, would be deemed very fortunate.

Again, the same Bond or Government Security may and not unfrequently does change hands from dealer to dealer half a dozen times the same day, and at the close of the day be in the same hands as in the morning. A tax upon each sale would amount to a large sum upon a single security.

The consequences and results cannot avail to defeat an Act if it is clear and unambiguous in its terms. But in cases of doubt, the inconvenience that would result from a particular construction may very properly be taken into account, and turn the scale in favor of that interpretation which will burthen the citizen the least and advance the public interests the most.

Frisbie *vs.* Blight, 2 Cranch., 386.

The following argument submitted by Mr. C. BULLITT, on the trial of this action, at the Circuit, and for convenience is made a part of this brief now submitted.

It is now proposed to treat of the construction to be given to the language of the Acts of Congress which are regarded as applicable, and to present a statement of the action of Congress upon the subject of taxing sales during their late session.

It is believed that a critical examination of these acts and of the proceedings of the late Congress will demonstrate the unsoundness of the claim to tax the sales made by bankers and brokers of their own property as now set up by the officers of the Internal Revenue Department.

The acts, which bear upon the questions involved, are as follows:

"An Act to provide Internal Revenue to Support the Government, to pay interest on the Public Debt, and for other purposes." Approved June 30, 1864; Acts 1863–4, p. 223.

"SEC. 79. *And be it further enacted:* That there shall be paid annually for each license granted the sum herein stated, respectively.

"Any number of persons, except lawyers, conveyancers, claim agents, physicians, surgeons, dentists, cattle brokers, horse dealers, and pedlars carrying on such business in copartnership, may transact such business at the place specified in their license, and not otherwise: that is to say,

"*One.* Bankers using or employing a capital not exceeding the sum of fifty thousand dollars, shall pay one hundred dollars for each license; when using or employing a capital exceeding fifty thousand dollars, for every additional thousand dollars in excess of fifty thousand dollars, two dollars. Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be regarded a banker under this act. *Provided,* That any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning the same for the benefit of its depositors, and which does no other business of banking shall not be liable to pay for a license as a banker.

* * * * * * * * *

"*Nine.* Brokers shall pay fifty dollars for each license. Every person, firm, or company, except such as hold a license as a banker, whose business it is as a broker to negociate purchases or sales of stocks, exchange, bullion,

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* * * * * * * * *

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coined money, bank notes, promissory notes, or other securities, shall be regarded as a broker under this act; and shall make oath according to the form to be prescribed by the Commissioner of Internal Revenue that all their transactions are made for a commission. *Provided*, That any person holding a license as a banker shall not be required to take out a license as a broker.

* * * * * * * * *

"*Thirteen.* Produce brokers, whose annual sales do not exceed the sum of ten thousand dollars, shall pay ten dollars for each license. Every person, other than one holding a license as a broker, wholesale or retail dealer, whose occupation it is to buy or sell agricultural or farm products, and whose annual sales do not exceed ten thousand dollars, shall be regarded as a produce broker under this act.

"*Fourteen.* Commercial brokers shall pay twenty dollars for each license. Any person or firm whose business it is as a broker to negociate sales or purchases of goods, wares, produce or merchandise, not otherwise provided for in this act, or seek orders therefor, in original or unbroken packages, or to negociate freights and other business for the owners of vessels, or for the shippers or consignors or consignees of freight carried by vessels, shall be regarded as a commercial broker under this act.

* * * * * * * * *

"*Forty-nine.* A license fee of ten dollars shall be required of every person, firm, or corporation, engaged in any business, trade, or profession, whatsoever, for which no other license is herein required, whose gross annual receipts therefrom exceed the sum of one thousand dollars per annum."

"SEC. 99. *And be it further enacted:* That all brokers and bankers doing business as brokers, shall be subject to pay the following duties and rates of duty upon the sales of merchandise, produce, gold and silver bullion, foreign

exchange, uncurrent money, promissory notes, stocks, bonds, or other securities as hereinafter mentioned, and shall be subject to all the provisions where not inapplicable thereto, for the returns, assessment, collection of the duties, and liens, and penalties, as are prescribed for the persons, firms, companies, or corporations owning, or possessing, or having the management of railroads, steamboats, or ferry boats; that is to say, upon all sales of merchandise, produce, or other goods, one-eighth of one per centum; upon all sales and contracts for sales of stocks and bonds, one-twentieth of one per centum on the par value thereof; and of ~~gold and silver bullion and coin,~~ foreign exchange, promissory notes, or other securities, one-twentieth of one per centum on the amount of such sales, and of all ~~contracts for such sales~~. *Provided*, That any person, firm, or company not being licensed as a broker or banker, or wholesale or retail dealer, who shall sell or offer to sell any merchandise, produce, or gold and silver bullion, foreign exchange, uncurrent money, promissory notes, stocks, bonds, or other securities not bona fide at the time his own property, and actually on hand, shall be liable in addition to all other penalties provided in such cases to pay fifty per centum in addition to the foregoing duties and rates of duty.

"An act to amend an act entitled 'An Act to provide Internal Revenue to Support the Government, to pay Interest on the Public Debt, and for other purposes. Approved June 30, 1864.' Approved March 3, 1865.

"That section seventy-nine be amended * * * * by inserting in paragraph nine, after the words 'other securities' the words 'for themselves or others;' by striking from said paragraph the words 'and shall make oath or affirmation according to the form to be prescribed by the Commissioner of Internal Revenue, that all their transactions are made for a commission.' * * * *

"By striking out all of paragraph 'forty-nine' and inserting in lieu thereof the following to wit;—(Here follow

certain provisions as to miners, expressmen, substitute brokers and insurance brokers.)

* * * * "That section ninety-nine be amended by striking out the words 'gold and silver bullion and coin' and by striking out the words 'of all contracts for such sales,' and inserting in lieu thereof the words "upon any sales or contracts for the sale of gold and silver bullion and coin, one-tenth of one per centum on the amount of such sales or contracts."

In August, 1864, the Commissioners of the Internal Revenue Department decided that brokers and bankers were only liable to be taxed upon the sales made by them for *others*. This was under, and in accordance with the plain language of the Act of June 30, 1864.

But since the Act of March 3, 1865, it has been claimed by the Commissioner that the sales made by them for *themselves*, as well as for others, are liable to be so taxed.

The proposition upon which the claim rests may be stated thus:

1. That § 79, subsection 9, of the Act of June 30, 1864, defines the term "broker" wherever used in that act.

2. That § 99 taxes sales made by brokers and bankers doing business as brokers.

3. That the amendment to § 79, subsection 9, of the Act of March 3, 1865, defines the term "brokers" to be those who sell for themselves as well as for others. That the effect of this amendment is to define anew the terms "brokers and bankers doing business as brokers" in § 99, so as to include therein persons selling for themselves as well as for others.

Wherefore the sales made by "brokers and bankers doing business as brokers" for themselves, are liable to be assessed in the same manner as the sales made by them for others.

In answer to these propositions it is submitted:

I. The amendment to § 79, subsection 9, does not apply to § 99 by its own terms. There being no such express application it can only be introduced into it by implication.

II. § 99 is an independent section, and can have full effect given to its every word without any reference to § 79, subsection 9. Hence the amendment to the latter section does not of necessity imploy a corresponding amendment to the former.

III. The terms used in § 79, subsection 9, are not the same terms with those used in § 99, and therefore the amendment to § 79, subsection 9, cannot be introduced into § 99 by any implication.

IV. Congress did amend § 99, in some respects, but not in this, and by leaving in it a proviso, repugnant to the interpretation contended for, they demonstrated their intention not to disturb or alter it.

V. There is nothing in the acts referred to from which an intention to tax such sales made by bankers can be inferred, and no foundation for even the semblance of such a claim.

VI. Congress refused to tax sales, and by their proceedings afforded conclusive evidence that they did not intend to tax such sales as are now under consideration.

I. It is only necessary to read the amendment to § 79, subsection 9, to see that it is not by its express terms applicable to § 99. See amendment, ante, p. 4.

II. So far as the terms used and the subjects of taxation are concerned, § 99 is a complete act of Legislation. It is not dependent upon § 79, subsection 9, for the definition of its terms or for the class of subjects to be taxed. It borrows no force or vitality of any kind from that source. It could be enforced by the proper officers of the Government without reading any part of § 79. Its lan-

guage is not technical or artificial. Every assessor knows that sales made by "brokers or bankers doing business as brokers," are sales made for others on commission. § 79, subsection 9, as originally passed, gave no different meaning to these terms.

If it be true that § 99 is thus independent, then there can be no such relations between the two sections, because they are found in the same act, as to render it a necessity that the amendment of one section should work an amendment of the other.

III. The terms used in § 79, subsection 9, act of June 30 1864, are "Every person, firm or company, except such as hold a license as a banker, *whose business* it is as a broker to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes or other securities, shall be regarded as a broker under this act."

The terms used in § 99 are "all brokers and bankers doing business as brokers, shall be subject to pay the following duties and rates upon the sales of *merchandise*, *produce*, gold and silver bullion; foreign exchange, uncurrent money, promissory notes, stocks, bonds, or other securities, &c."

Merchandise and produce brokers are embraced under the term "brokers," as well as those who buy and sell gold and silver, stocks, &c.

In the one case three classes are included. In the other only one.

The terms used in the two sections are not identical. They are not synonymous, nor are they convertable. The utmost that can be said is that § 79, subsection 9, defines one species of broker, while in § 99 the general term is used.

But the larger term cannot be defined by the less. They are no more identical or convertible in this instance than in any other in which the species may be introduced

for one purpose and the genus for another. The terms used in § 99 are no more identical or convertible with those used in subsection 9, than they are with produce or commercial brokers, as used in subsections 13 and 14. The necessity for regarding this distinction becomes still more obvious when the amendment is considered.

The persons described in § 79 subsection 9, were brokers, but by the amendment a new class of persons were added to this species, viz: those who buy and sell for themselves.

The effect of this amendment was to give a new, technical and artificial meaning to the words "whose business it is as a broker."

Is this artificial meaning thus superaded in order to reach a new class of persons and compel them to pay certain license fees, to be engrafted by implication upon another section relating to a different object?

It is to be borne in mind that in defining brokers to be persons who sell for themselves, it is not merely adding a new class. It is in fact making the word mean the very opposite of that which it meant when the original act was adopted. It is a perversion of language to say that broker shall mean a person who sells for himself. In other words, the persons who sell for themselves are *not*, in point of fact, brokers, although embraced by the provisions of the amendment. (See *American Encyclopædia*, Article "Broker.")

The word used in § 99 being the natural or ordinary and well understood term, and those introduced by the amendment being artificial and purely arbitrary, how can it be said that one is defined by the other?

The argument in favor of the proposed effect of the amendment might not have so much difficulty to contend with if produce and merchandise brokers were not included in the term "brokers" in § 99. But they are, and they

fix the meaning of the word. They hold it fast. As to them it retains its primary, ordinary, generic meaning.

To admit the proposed effect of the amendment is to sever it into parts—to *leave* it in its natural or generic meaning as to all classes of subjects save one, and to pervert it as to that one.

Again, if § 99 had reference to licenses there might be some reason in the claim set up. But it makes none, and it has none from any necessity. The two sections relate to different subjects and perform different functions. One might be altered or changed without affecting the other. For example, suppose Congress had repealed the sections requiring brokers of all kinds to take out licenses but left § 99 standing. It is clear that would not have worked a repeal of § 99 by implication. If this be true it must follow that an amendment which enlarges the scope of one of the paragraphs as to the persons who shall take out licenses can not be invoked to enlarge or effect § 99 by implication.

The rule which would forbid the implied repeal in the one case, must have equal virtue when brought to bear upon the supposed enlargement by implication in the other.

It is not contended that a statute may not be amended by implication. But it is insisted that when such a claim is set up by the officers of the Government for the purpose of imposing an onerous tax upon one class of citizens, to the like of which no others are subjected, they should be able in justification of such a claim to point out the plain direct and unmistakable language of the statute which works such an effect.

If a revenue law be ambiguously and obscurely worded, the interpretation is ever in favor of the subject. Mr. Justice Heath, in Hubbard *v.* Johnson, 3 Taunt., 176.

The language of the amendment to subsection 9, is certainly ambiguous and obscure when the attempt is made

to apply it to § 99, and can not be so applied without a clear and palpable violation of this rule.

IV. If Congress had intended to amend § 99, as contended for, the simple method would have been to have said so in words in the amendments to that section itself. They amended it in other respects. See amendments to § 99, March 3, 1865, ante, p. 4.

The failure to do so as to this matter, would seem fairly to negative any such inference as is now sought to be drawn from their amendment to subsection 9.

This conclusion is very much strengthened by the fact, that they left in § 99 the proviso. It is evidently inconsistent with the construction proposed to be given to that section. See proviso to § 99, ante, p. 4.

It is reasonable to suppose that Congress understood what was contained in § 99, especially as they did amend it, and it is also reasonable to suppose that they expressed in the amendments to that section itself, all the alterations they intended to make in its provisions. They made none in the kinds of sales to be taxed. Their action should not be supplemented by implication or artificial construction.

They did amend in some respects. They did not in this, and the plain answer to the claim now made, should be, that it is not written in the amendment they did make.

V. It is difficult to conceive upon what semblance of foundation the claim rests for taxing sales made by bankers for themselves. The amendment does not in terms apply to them. On the contrary, they are excepted from the class of persons who are required to take out a license under subsection 9. The section defining who shall be regarded as bankers, and take out license as such, is not altered or amended.

So far as they are concerned, the language of § 99 is not changed or modified. To apply the effect of the amendment to subsection 9 to their sales, under § 99, requires—

1. The implication already commented upon as to brokers

and, 2. The still further implication that the amendment as to brokers was intended to be applied to them.

The claim rests on this double implication. We know of no rule and no precedent which will justify such a conclusion from such premises. An inference so far fetched involves a process of reasoning too refined and subtle to be consistent with the simple and well-settled rules that prevail in the construction of statutes.

Turn from this proposition to subsection 1, § 79, ante, p. 2, which applies to bankers. Read it, and then read § 99. These are the only clauses relating to bankers. Subsection 9 may be expunged as far as they are affected by it. The amendment does not embrace them either expressly or by implication. Reading the Act as to them with subsection 9 stricken out, it leaves them liable only to the tax as imposed by the Act of 1864, viz.: to the tax on sales made by them for others on commission.

VI. But a still further argument as to the intention of Congress is to be deduced from the fact, that while considering the amendments to the Act of June 30, 1864, a proposition to tax such sales as are now under consideration, was made and voted down.

On the 16th of February, 1865, while the Act of March 3, 1865, was under consideration in the House of Representatives in the Committee of the Whole, Mr. Boutwell offered the following amendment:

"That in addition to the duties imposed in section ninety-four of the Act to which this is an amendment, as hereinbefore amended, there shall be levied, collected, and paid upon the goods, wares, and merchandise therein mentioned, except as hereinafter otherwise provided, an increase of one-fifth, or twenty per cent. of the duties or rates of duty now provided in said section, whether *ad valorem* or specific: *Provided*, That the additional duties or rates of duty herein mentioned, shall not apply to coal, illuminating oil refined, and naptha, benzine and benzole, paper of all de-

scriptions, printed books, magazines, pamphlets, reviews, and similar publications, cotton, manufactured tobacco, snuff, cigars, cigarettes, and cheroots."

And inserting in lieu thereof, as follows:

"That all persons licensed under the provisions of this Act, or of the Act to which this is an amendment, and who are engaged in the sale of goods, wares, or merchandise, or of articles produced or manufactured, whether foreign or domestic, shall within ten days after the first day of each and every month, make return, under oath or affirmation, of the amount of goods, wares, and merchandise, or articles sold during the month preceding, and shall pay thereon a tax of one-half of one per cent.; and all such persons in the assessment and collection of the tax imposed by this section, shall be subject to the provisions of law relating to the assessment and collection of taxes of manufacturers, mentioned in the eighty-second section of the Act, to which this is an amendment, as far as the same are applicable." (See *The Congressional Globe*, Feb. 16, 1865, p. 843.)

On the 17th of February, 1865, this amendment came up for consideration in Committee of the whole.—*Con. Globe*, p. 873.

Mr. Hooper moved to amend the amendment by inserting the following: "Including all sales of stocks by brokers and others, and excluding all sales of agricultural products."—*Con. Globe*, p. 876.

This amendment was not agreed to.—*Con. Globe*, p. 878.

On the same day Mr. Spalding moved to amend the amendment by inserting the following as a substitute:

"That from and after the 1st day of April, 1865, there shall be levied, collected, and paid, on all sales of produce and merchandise and other articles, including all personal property, but not including bullion or coin of any description, nor securities for money, evidences of debt, nor sales made at auction, one-half of one per cent. when the amount of such sales exceeds fifty dollars in any one month, the

amount of sales to be returned by the vendor monthly, in the same manner and at the same time as is provided by law for the returns of manufacturers; and all the provisions of the act to which this act is an amendment relating to the assessment and collection, and to the enforcement of the law relating to manufactures, shall extend to and be applied, as far as applicable, to sales of produce and merchandise as aforesaid. The section to remain in force for the period of one year, during which period no person or persons who shall be required to pay the tax or duty enforced by this section, shall be required to pay an additional license, tax or duty, where the rate of such license, tax or duty is graduated, under existing law, by the amount of sales or receipts." (See *The Congressional Globe*, p. 879.)

Mr. Broomall moved to amend the substitute by striking out the words "but not including bullion or coin of any description, nor securities for money, evidences of debt, nor sales made at auction." The amendment to the substitute was rejected.—*Con. Globe*, p. 879.

The question was taken on the substitute and it was rejected.

The question recurred on Mr. Boutwell's Amendment. It was adopted by the Committee of the Whole. Ayes, 58; nays, 56.—*Con. Globe*, p. 879.

On the 18th of February, 1865, the amendment of Mr. Boutwell, (being the 55th amendment), came before the House of Representatives for consideration. The question was taken and it was decided in the negative. Yeas, 62; nays, 75.—*Con. Globe*, p. 906

On the 1st of March, 1865, the Senate having under consideration the Amendments to the Act of June 30, 1864 the amendment from the Committee on Finance, came up for consideration to insert the following at the end of the bill as a new section:

"SEC. *And be it further enacted*, That all persons li-

censed under the provisions of this act, or the act to which this is an amendment, and who are engaged in the sale of goods, wares, or merchandise, or of articles produced or manufactured, whether foreign or domestic, shall, within ten days after the 1st day of each and every month, make return, under oath or affirmation, of the amount of goods, wares, and merchandise, or articles sold during the month preceding, and shall pay thereon a tax of one-half of one per cent.; and all such persons, in the assessment and collection of the tax imposed by this section, shall be subject to the provisions of law relating to the assessment and collection of taxes of manufacturers, mentioned in the eighty-second section of the act to which this is an amendment, as far as the same are applicable. And the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to make all needful rules and regulations for the assessment and collection of the tax imposed by this section. (See *The Coagressional Globe*, March 1. 1865, p. 1246.]

After a lengthy debate the question being taken by yeas and nays on the amendment of the Committee, resulted, yeas 20, nays 20. The Vice President decided affirmatively.—*Congressional Globe*, p. 1248.

The House of Representatives having thus rejected the tax on sales, and the Senate having adopted it, a Committee of Conference was appointed. On the 3d of March the Senate Committee of Conference reported (*inter alia*), that the Senate recede from their amendment as to the tax on sales—*Congressional Globe*, p. 1359.

The discussion which ensued was almost entirely in reference to this question. The debate shows that it was fully considered and finally the report was concurred in, whereby this tax on sales was rejected by a vote of 32 to 9 senators.—*Congressional Globe*, p. 1360.

The examination of the debates above referred to will show:

1. That a vigorous effort was made by certain members of both Houses of Congress to have a tax levied upon all sales of personal property.

2. That the proposition to tax the kinds of sales involved in the cases now under consideration, viz: those made by brokers, was distinctly made and urged.

3. That the latter proposition was separately voted down or rejected.

4. That the tax on sales of personal property generally was also rejected, after a thorough and elaborate discussion.

The reasons which prevailed to induce Congress to vote down these propositions are fully and ably presented in the remarks made by the opposing members. The whole subject was thoroughly ventilated. The views of the best writers upon political economy were cited. The disastrous experience of other countries in which similar taxes had been levied was adduced. The paralyzing effects upon trade which must inevitably result from such a system were pointed out, and it was pronounced by many of the members as the most inexpedient and vicious species of taxation that could be adopted. See the remarks of Mr. Morrill, *Congressional Globe*, pp. 873–4 and 994; Mr. Garfield, p. 874; Mr. Hooper, p. 878; Mr. Powell, p. 1246; Mr. Johnson, p. 1247; Mr. Cowan, p. 1360.

Perhaps no better illustration can be found of the wisdom of that rule of construction which requires that, if a revenue law be ambiguously and obscurely worded, the interpretation shall be in favor of the subject, than is presented in these cases. Congress voted down a law providing expressly a tax on the kind of sales now under consideration, and yet it is sought to imply, by an amendment to a paragraph relating to licenses, an intention to put a tax on the same sales.

Congress was at hand to explain what they intended.

They refused in an explicit and solemn manner to impose this burden. Yet the revenue officers, by their construction of an amendment most ambiguously and obscurely worded, when attempted to be applied as is now proposed, would work out the extraordinary result of having a law passed in the same breath which did impose it.

In maturing the Act of March 3, 1865, Congress rejected an amendment to the Act of June 30, 1864, expressly taxing sales. Can it be reasonably inferred that by an amendment in the same act to the Act of June 30, 1864, they intended to *imply* that which they had *expressly* refused to do?

Full effect can be given every word in the amendment to subsection 9 without resorting to any such forcing process as is required to sustain the position taken by the Revenue Department.

The object of the amendment was to reach that class of persons who call themselves brokers, but who bought and sold for themselves. Previously they came under paragraph 49 (ante, p. 3,) § 79 of Act of June 30, 1864. They paid only $10 license fee.

By Act of March 3, 1865, paragraph 49 was stricken out, ante, p. 4. By the amendment to subsection 9 they were brought into the class of brokers, so far as their licenses were concerned, and their license fee was raised from $10 to $50.

This was the purpose of the amendment to subsection 9, and is the only one which can be inferred from it under any reasonable interpretation. Implications by forced and doubtful construction cannot be made in rendering statutes which impose taxes. This is hornbook law. Can there be anything in these cases to take them out of the operation of this salutary rule?

Brokers and Bankers are citizens, entitled to the same protection as all others are. There business is a lawful one. They already contribute as much as, and perhaps,

relatively more than any other class of citizens in the way of taxation. Should sales made by them of their own property be taxed when those made by all other persons are exempted?

Congress did not think so. For they voted down the proposition when made during the last session.

No support can be drawn from their debates or proceedings upon which to maintain so unjust a discrimination.

The claim rests upon an implication entirely too subtle and refined for the common understanding. To interpolate, by inference, an amendment to a paragraph regulating licenses into a section regulating taxes on sales, in the mannner and under the circumstances now proposed, requires a straining of the reasoning faculties much beyond the power of ordinary men.

It is respectfully submitted that such a result cannot be worked out by any fair construction of the statutes in question, and that by the plain reading of the law, brokers and bankers doing business as brokers, are not liable to be taxed upon the sales made by them of their own property.

The Judgment of this Circuit Court should be affirmed

W. F. ALLEN,
JOHN E. BURRILL,
JOHN C. BULLITT,
W. M. EVARTS.
Of Counsel for Defts. in Error.

LAW REPORTS.

UNITED STATES CIRCUIT COURT.

THE UNITED STATES,
vs.
HARVEY FISK *and* ALFREDERICK S. HATCH,
Revenue Bankers and Brokers.

NELSON, *Ch. J.*—This is an action to recover an amount of duties upon the sales of Government stocks by the defendents, under the Act of Congress of June 30, 1864, amended by the Act of 3d March, 1865.

The defendants are Bankers in the City of New York, licensed under section seventy-nine of the former Act. In the course of their business they buy and sell Government securities on their own account, and for themselves, and not for others, or on commission.

It is admitted that in the month of April last they sold, as such Bankers, Government stocks held and owned by them in their own right, the duties upon which, if they are subject to the payment, amounted to the sum of $1,000, under the seventy-ninth section of the Act of 1864.

The question involved in the case is, whether or not, the defendants are liable to this tax?

The first subdivision of section ninety-nine of the Act of 1864 required bankers, employing a capital not exceeding $50,000, to pay a license fee of $100—and, for every additional $1,000, $2. It also defines the term "bankers," within the meaning of the Act, as follows:—"Every person, firm, &c., *having a place of business*—1, where credits are opened by a deposit or collection of money, &c, subject to be paid or remitted upon draft, &c.; 2, where money is advanced, or loaned on stocks, &c.; or—3, where stocks, &c., are received for discount or sale.

By subdivision nine, brokers are required to pay a license fee of $50; a broker is defined as follows: "Every person, firm &c., except such as hold a license as a banker, whose business it is as a broker to negociate purchases, or sales of stocks, exchange, &c., or other securities."

By subdivision thirteen. Produce brokers pay a license fee of $10, and subdivision $14; Commercial brokers pay a fee of $20.

Wholesale dealers in merchandise, &c., pay a license fee of $50, (sub. 2,) and retail dealers a fee of $10, (sub 3.)

The Ninety-ninth section of the Act of 1864, enacts: That brokers, and bankers doing business as brokers, shall pay the following rates of duty: "Upon all sales of merchandise, produce or other goods, one-eighth of one per centum; upon all sales and contracts for sales of stocks, and lands, one-twentieth of one per centum on the par value thereof," &c., provided, that any person, firm &c., not being licensed as a broker, or banker, or wholesale or retail dealer, who shall sell, &c., any merchandise, produce, &c., "stocks, bonds, or other securities, *not bona fide*, at the time their own property, and actually on hand, shall be liable to pay, &c., fifty per centum in addition to the foregoing duties."

The law thus stood under the act of June 30, 1864, and, it is admitted on behalf of the government, that, under the provisions of this act, neither the broker, or banker doing business as a broker, was subject to the duty of one-twentieth of one per centum. when doing business on their own account, or for themselves; but, only, upon sales made for others, or on commission; in other words, when acting in the character and capacity of brokers. This section ninety-nine, in terms, limits the tax to sales made by brokers, and bankers doing business as brokers.

The word is familiar and well understood as used in statutes or in its legal acceptation. A broker is an agent employed to make bargains and contracts between other

persons in matters of trade or business, usually for compensation called brokerage.

The difficulty in this case arose out of the amendments made by the act of 3d March, 1865.

The first amendment bearing on the question is of the ninth subdivision of section seventy-nine, by adding to the words other securities, "for themselves or others." This enlarges the definition of a broker, and makes the term embrace a person, or firm negotiating purchases or sales of stocks, &c., for themselves as well as for others. Since this amendment, it is insisted that the enlarged meaning shall be applied to the term as used in section ninety-nine, and hence the broker is liable upon sales of stocks made in his own right and for himself, to the duty of one-tenth of one per centum.

There are several difficulties in the way of this construction.

In the first place, this section was amended at the same time and by the same act, without, at all, effecting or even alluding to any change, or intended change to the meaning of the word brokers as originally used in it.

In the second place, the words brokers and bankers doing business as brokers, in section ninety-nine, embrace produce and commercial brokers, who are subject to a tax of one-eighth of one per centum upon their sales. Now, it cannot be pretended that as to this class of brokers, they are subject to this enlarged meaning, that is, that they are liable for the duty or tax on sales made in their own right, and for themselves. A special license is provided in the case of such sales, as is seen in subdivisions thirteen and fourteen of the seventy-ninth section of the Act of 1864, and which have not been altered or amended. The words, therefore, in section ninety-nine, as it respects this class, must be taken in their ordinary and legal acceptation, and not otherwise; and, in order to give the argument any force in favor of the transfer of the enlarged meaning of

the terms to this section, we shall be obliged to hold that the same word possesses different and opposite meanings when used in the same section, and in the same connection. And, finally, *in the third place*, the proviso to section ninety-nine, forbids the construction claimed. That prohibits persons or firms from selling, among other articles, stocks or bonds, without a license as a broker or banker, unless at the time, their own property *bona fide* and actually on hand, clearly indicating, we think, that the sales contemplated in the enacting clause are limited to those made as brokers for others, and not in their own right and for themselves.

As we have seen, the amendment wrests from the word broker its true meaning, as known in law or commerce; and if this new meaning is to be extended beyond the immediate connection in which the word is found, especially in a statute regulating and establishing a system of taxation and revenue, it will lead to consequences never intended by the lawmakers, and involve contradictions and absurdities, that it would be unjust to impute to them.

The word whenever used in the Act of 1864, was used in its ordinary acceptation, and the object of the change of meaning in the ninth subdivision of section 79 by the amendment is not apparent. It may have had reference to the license fee, or, in addition to this, it may have been made with a view to gard against an evasion by persons doing business as brokers. It is understood that the negotiation of sales of stocks, in the several boards of brokers, the contract of sales is made in the name of the broker, and apparently on his own account, and for his own benefit, although, as between him and his customer, it is made for the benefit of the latter. The amendment prevents any advantage to be gained by setting up the apparent contract, as the real one intended.

The proviso to the ninety-ninth section, would seem to have had in view the possibility of this practice on the part of the broker, and hence limits the sales exempt

from tax by persons on their own account, and for their own benefit, to sales of their own property *bona fide*, at the time, and which was then on hand.

We are quite aware of the difficulties and perplexities attending the construction of the acts of the Legislature as obscure and contradictory as the present one; but, after the best consideration, and for the reasons above stated, we have come to the conclusion that neither brokers nor bankers doing business as a broker, are liable under the ninety-ninth section of the act of 1864, to the duty claimed upon sales made in their own right, and for themselves, and not for others or on commission.

According to stipulation of the attorneys and counsel, judgment must be rendered for the defendants.

The United States vs. *Robert L. Cutting et al.*—July 5, 1865.—NELSON, C. J.—For the reasons given in the case, the United States *vs.* Fisk and Hatch, judgment must be entered for the defendants.

TREASURY DEPARTMENT,
OFFICE OF INTERNATIONAL REVENUE.

Washington, Aug. 22, 1864.

SIR.—In reply to your letter of July 26, that the tax imposod upon brokers' sales by section 99, was intended to be, imposed only upon their sales as brokers. The law did not intend to exclude brokers from the transaction of other business, for the same party may be both a dealer and a broker, or he may buy and sell stocks, &c., on his own account, but neither his sales as a dealer or in his own private business are to be returned under section 99.

Very respectfully,

JOSEPH J. LEWIS,

Comissioner.

LATHROP & MOTT,
40 WALL STREET,
New York.

S. M. W.